IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 253

PAUL K. ROBERTS

W. L. LOVE, JAMES MOSELEY, O. K. LITTLEFIELD, JAMES WHITE, MARION WHITE, D. B. A[illegible], ROBERT E. NEWTON

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Attacker Sent To Hospital For Observation

Through a legal technicality, Judge G. B. Colvin, Jr., Tuesday was forced to send A. C. Duncan, admitted culprit in an attempted rape case here, to the State Hospital for 30 days of observation.

Duncan's hearing before Judge Colvin was held Tuesday evening, and Paul K. Roberts, Warren attorney, was appointed as the Negro's lawyer.

When Duncan was asked to make a plea of guilty or not guilty, Attorney Roberts arose and made a motion that he be sent to the State Hospital for observation. Roberts said he thought the Negro might be insane.

Prosecuting Attorney A. James Linder of Hamburg asked Roberts if he really thought that or if he was "grasping for straws." Roberts assured the Court that he felt the Negro might be insane.

Judge Colvin deliberated about the matter for several minutes before granting Roberts' motion, but he told those present that under law, he was forced to do it.

At the start of the hearing, a representative of this newspaper received the permission of Judge Colvin to take candid camera pictures while the hearing was going on. After court started, however, Attorney Roberts raised an objection to the photographer's being allowed to take pictures. No more were taken.

Duncan admitted to Chief of Police Tommy Dunaway and to the Editor of The Eagle Democrat Wednesday that he raised the window of an East Central Street home here, went in the window, and attempted to attack a high school senior girl. He said he wasn't being forced or coerced into making the statement, but that he was making it of his own free will.

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IN THE

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OCTOBER TERM, 1960

No. 253

PAUL K. ROBERTS,

Petitioner,

vs.

W. L. LOVE, JAMES MOSELEY, O. K. LITTLEFIELD, JAMES WHITE AND MARION WHITE, A PARTNERSHIP, D/B/A THE EAGLE PUBLISHING COMPANY, AND ROBERT L. NEWTON,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Petitioner herein seeks a Writ of Certiorari to the Supreme Court of Arkansas to obtain review of a judgment of that Court affirming a judgment of dismissal of the above entitled action entered by the Circuit Court of Bradley County, Arkansas, upon Respondents' Demurrer to Petitioner's Complaint and Amendment thereto. Both of said Courts held that Petitioner's Complaint and Amendment thereto failed to state a cause of action for libel.

Petitioner's Petition must be denied because no federal

question is presented herein, and even if any federal question is presented the same was not timely and properly raised in the Court below.

Because it is thought it will be helpful to this Court, before discussing the jurisdiction of this Court and Petitioner's contentions herein, an error in Petitioner's Petition is first noted and a brief statement is made of the pertinent facts out of which this litigation arose.

Error in Petitioner's Statement of Question Presented

In Petitioner's statement of question presented to this Court, it is said:

> "The Trial Court and the Supreme Court of Arkansas sustained the Motion to Strike and the Demurrer and dismissed the Complaint."

This statement is partly in error. While the Trial Court and the Supreme Court of Arkansas both sustained Respondent's Demurrer to Petitioner's Complaint and Amendment thereto, the Supreme Court did not sustain Respondent's Motion to Strike as the Trial Court had done. On this point the Supreme Court of Arkansas said:

> "While we think it immaterial in this litigation, we agree with Appellant that the Court erred in striking paragraphs 4a, b, c, d and e. The article, obviously, cannot be classed as libelous *per se*. Any alleged libel, therefore, required innuendo denoting the libelous sense in which the words were intended. . . . We therefore, in reaching our determination of whether the article was libelous, consider each averment in Appellant's Complaint" (Petitioner's Petition for Writ, pp. 11, 12.)

Factual Statement

On September 12, 1959, Petitioner commenced his action for alleged libel against Respondents in the Circuit Court of Bradley County, Arkansas. The news article of which Petitioner complained was written by an Employee, Robert L. Newton, and published in the weekly edition of The Eagle Democrat, a county newspaper owned by the Respondents, Love et al. The complaint set out the news article in full and in paragraphs 4a, b, c, d & e there were alleged Petitioner's interpretations of the objective report of a newsworthy incident in a local courtroom. Petitioner's conclusions in his Complaint were that the story was slanted and maliciously designed to defame Appellant's reputation. The article started with these words:

> "Through a legal technicality, Judge G. B. Colvin, Jr., Tuesday, was forced to send A. C. Duncan, admitted culprit in an attempted rape case here, to the State Hospital for 30 days of observation. Duncan's hearing before Judge Colvin was held Tuesday evening, and Paul K. Roberts, Warren Attorney was appointed as the Negro's lawyer. When Duncan was asked to make a plea of guilty or not guilty, Attorney Roberts arose and made a motion that he be sent to the State Hospital for observation. Roberts said he thought the Negro might be insane." (See Petitioner's Petition for Writ, p. 9, and, the entire article printed on the front page of The Eagle Democrat—a photo print of which is pasted within the fly cover of this Brief).

In the Trial Court and Supreme Court of Arkansas, Petitioner contended that because of the use of the term "legal technicality", which he alleged to be false, the complexion of the entire content of the article was changed. He further contended that the term "legal technicality" denotes to the public mind "chicanery"; implies that one prevails, not because of right, but rather through trickery;

in other words, that justice was thwarted by unfair methods. Petitioner does not contend that any paragraph of the news article is false except the first paragraph in its use of the words "legal technicality."

In the Trial Court, Respondents filed a Demurrer to Petitioner's Complaint and Amendment thereto on the ground that no cause of action for libel was stated therein. Also, Respondents filed a Motion to Strike the paragraphs of the Complaint stating Petitioner's interpretations of the news article were erroneous. The Trial Judge, who was presiding over the Court when the incident reported in the news article occurred, also, conducted the hearing on Respondent's Demurrer and Motion to Strike Petitioner's Complaint for the alleged libel. After full hearing, the Trial Court sustained the Demurrer and Motion to Strike and dismissed the suit on the ground that no cause of action for libel was stated. On appeal to the Supreme Court of Arkansas by Petitioner, after briefs were filed and oral arguments were heard, the Appellate Court affirmed the judgment of the Bradley Circuit Court in sustaining the Demurrer and in dismissing Petitioner's suit. Also, the Supreme Court of Arkansas denied Petitioner's Petition for a Rehearing.

Petitioner's Petition for Writ of Certiorari to the Supreme Court of Arkansas to obtain review of the judgment of that Court affirming the judgment of dismissal of the above claim in the Circuit Court of Bradley County, Arkansas, must be denied for the following reasons:

(1) The States are left to regulate trials in their own Courts and a trial by jury in suits at common law pending in a State Court is not a privilege or immunity of American citizenship; (2) no federal question is presented in Petition of Petitioner; and, (3) if any federal question is

presented, it was not timely and properly raised in the Court below.

A Trial by Jury in a State is Not a Privilege or Immunity of National Citizenship

Petitioner contends that as guaranteed to him by Amendment Five to U. S. Constitution (an American citizen cannot be deprived of life, liberty or property without due process of law), Amendment Seven (right of trial by jury in suits at common law in any Court of the United States), and, Amendment Fourteen (no State shall deprive a person of life, liberty or property without due process of law nor deny to any person the equal protection of the laws), he has been denied due process by State action in the failure to allow to him a jury trial in a State Court on his claim of being libelled.

Petitioner further says he was denied of a constitutional right as an American citizen to have his allegations of libel tried by a jury because of Article 2, Section 8, Constitution of Arkansas (securing protection to one against criminal charges).

On April 24, 1876, this Court decided in *Joseph A. Walker* v. *Charles S. Sauvinet*, 92 U.S. 90; 23 L. Ed. 678, wherein judgment was rendered in a State Court against Walker by the Judge in a suit for damages after a jury had failed to agree and under a Statute vesting that power of adjudication in the Judge, that "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. . . . Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to

determine whether it is in conflict with the Supreme law of the land. That is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art. VI Const. Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

Walker v. Sauvinet has been cited in 25 Federal cases and in 19 State Court decisions according to Shepard Citator. It has not been overruled. It was distinguished in *American Publishing Company* v. *Fisher*, 166 U.S. 464, 41 L. Ed 1079 dealing with a territorial act in Utah. The case is cited in *Bute* v. *Illinois*, 333 U. S. 639 at page 659, 92 L. Ed. 986 at page 996, and *Stein* v. *New York*, 346 U. S. 156 at page 179, 97 L. Ed. 1522 at page 1539. In the Stein case, this Court said:

> "The States are free to allocate functions between judge and jury as they see fit."

Certainly, a function and power of a Trial Judge under the Statutes in Arkansas when a Demurrer to a Complaint raises the question that no cause of action is stated is to decide that issue of law after treating the facts as well pleaded to be true. See, Arkansas Statutes 27-1115.

The Petition Presents No Federal Question

Review by the Supreme Court of a judgment of a State Court requires that it appear from the record affirmatively or by fair implication, that a decision as to the federal question was necessary to the State's determination of the cause. *Williams v. Kaiser* (1945) 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363.

In Petitioner's Complaint and Amendment thereto alleging the news report of that which occurred in a court-

room defamed his reputation and Respondents' Demurrer and Motion to Strike, there was nothing to indicate or intimate there was involved any federal question. Petitioner's contentions boil down to the claim that the decision of the Supreme Court of Arkansas is erroneous. But, no constitutional provision is violated by an erroneous decision of a State Court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. Ed. 1107. Moreover, the Supreme Court of Arkansas did not commit any error in its conclusion that Petitioner's Complaint alleging libel did not state a cause of action.

Petitioner's contention that the Supreme Court of Arkansas denied him his right to property without due process of law in deciding he did not state a cause of action at law entitling him to a trial by jury in a State Court does not present a federal question. The Court had before it a question of law under the State's controlling Statutes and its own prior decisions.

In order to justify this Court in taking jurisdiction to review the decision of the Supreme Court of Arkansas, it must appear that a federal question arose in the State Court, that the question was decided by the State Court or by necessary intendment it appears it must have been raised and a decision made. It is not sufficient to show that a question might have arisen or is applicable unless it is further shown that it did arise and was applied by the State Court. *Crowell v. Randell* 10 Pet. (U.S.) 368, 9 L. Ed. 458. It is essential to show that a federal question actually arose. See, Annotation, Review of State Decisions, following *Minnesota v. National Tea Company*, 308 U. S. 550, in 84 L. Ed. 920 at Page 927. See also, *Black v. Cutter Laboratories*, 351 U. S. 292, 100 L. Ed. 1188.

If Federal Question Is Presented It Was Not Timely Nor Properly Made.

The Petition for Certiorari herein correctly reflects no federal question by a pleading or otherwise was raised, indicated or suggested in the case at bar until after the Supreme Court of Arkansas had decided the case and rendered its opinion therein on March 28, 1960. Thereafter, within 17 days, as the Rules of the Supreme Court of Arkansas allow (Rule 29, Rules of Supreme Court of Arkansas) Petitioner filed his Petition for Rehearing. For the first time in the case Petitioner injected his constitutional plea in this language:

> "The action of the Arkansas Supreme Court in sustaining the demurrer denied Appellant of his rights secured to him under the provision of Amendments No. 5, 7 and 14 of the Constitution of the United States." (Petitioner's Petition for Writ, p. 21).

As this Court said as recently as June 22, 1959 in *Raley v. Ohio*, 360 U. S. 423 at page 435, 3 L. Ed. (2) 1344 at page 1353:

> "But this does not suffice: It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the State Courts that a State Statute as applied, is repugnant to the Federal Constitution, treaties or laws."

In *McGarritty, Adm. v. Delaware River Bridge Commission*, 292 U. S. 19 at p. 20, 78 L. Ed. 1097 at p. 1096, this Court said:

> "No Federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without move. Appellant insists that questions under the Fourteenth Amendment were thus raised at the first opportunity. The petition for rehearing does not appear in the record. Nor does the

> record contain the pleadings, the evidence, or any findings by the State Court upon the question of fact involved. . . . The appeal is dismissed for the want of a properly presented substantial Federal question."

In *American Surety Co. v. Baldwin*, 287 U. S. 155 at p. 164, 77 L. Ed. 231 at p. 236, this Court in discussing the seasonable and proper manner of raising a federal question, stated:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court."

The inclusion in Petitioner's Petition for Rehearing filed in the Supreme Court of Arkansas of one sentence, "the Court in sustaining the Demurrer denied him of his rights under Amendments number 5, 7 and 14 of the Constitution of the United States," does not constitute a clear and timely presentation of a substantial Federal question which would lead this Court to review a decision of the Supreme Court of the State even though a Federal question was presented. In the case at Bar, no Federal question is presented.

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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Counsel for Respondents.